

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

vs.

TYSON FOODS, INC., *et al.*

Defendants.

Case No. 05-CV-0329-GKF-PJC

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**GEORGE’S, INC. AND GEORGE’S FARMS, INC.’S**  
**REPLY TO THE PLAINTIFFS’ RESPONSE TO MOTION TO STRIKE**  
**THE SUPPLEMENTAL REPORT OF DAVID R. PAYNE**  
**AND INTEGRATED BRIEF IN SUPPORT THEREOF [DKT. # 1992]**

COME NOW separate Defendants, George’s, Inc. and George’s Farms, Inc. (George’s), and for their Reply to the Plaintiffs’ Response in Opposition to George’s Motion to Strike the Supplemental Report of David R. Payne, (Dkt. #1992), state as follows, to-wit:

In their Response, Plaintiffs aver that George’s untimely produced financial documents on January 2, 2009 which they claim resulted in Mr. Payne needing to update his report after his deadline on January 5, 2009. [Dkt. #2032 at 2]. However, this assertion fails to explain why the Plaintiffs waited an additional 3 months after receiving the supposedly untimely information before preparing the Payne supplement on the eve of his deposition. It also fails seeks to distract from the point that the Plaintiffs did not seek leave of this Court to file the untimely supplemental report on April 14, 2009. George’s is left with supposing that the issuance and timing of Payne’s supplemental report was a strategic timing decision by the Plaintiffs to prejudice George’s in taking his deposition a few days later.

Plaintiffs also fail to acknowledge to the Court that the tardiness of any production of financial documents was an emergency of the Plaintiffs' own making. George's first objected to producing Plaintiffs' requested financial documents as early as 2006. [Dkt. #1867-2, Ex. A]. Yet, the Plaintiffs waited until December, 2008 to begin a meet and confer process, and waited until February, 2009 to file a Motion to Compel production. [Dkt. #1867]. This was well *after* Payne's report deadline in early January, 2009 and also over a month after George's had made it clear to the Plaintiffs that it would not produce additional financial materials without direction from the Court. [For a general discussion of this underlying discovery dispute, see Dkt. #1879, 3 – 8]. Thus, George's would submit that the Plaintiffs ceded any right to reasonably object to the timeliness of production of financial documents when they unreasonably delayed their meet and confer process from 2006 until late 2008, and when they failed to seek the Court's intervention when it became clear that the parties were at an impasse in late 2008.

As to the merits of the Plaintiffs' complaint regarding the timing of George's production of a single, 3 page audited Balance Sheet in April, 2009: following the Magistrate Judge's clarification of exactly what financial information George's was to produce to the Plaintiffs at a hearing on April 7, 2009, George's promptly contacted the independent accounting firm that maintains the information. [See Dkt. #1969]. George's then produced the information to the Plaintiffs when it was provided by the accounting firm to George's counsel. The substance of the information that would be forthcoming was communicated to Plaintiffs on April 9, 2009 by George's counsel. [Ex. A]. This single, audited balance sheet for George's, Inc. showed the *exact same* net worth for George's as the unaudited versions George's had previously produced on December 8,

2008. [See Dkt. Nos. 1879-2 and 1879-3, Exs. A and B<sup>1</sup>.] George's unaudited balance sheets had been created from the audited balance sheets; the unaudited balance sheets merely eliminated non-defendant details. Simply stated, Payne had *the same net worth numbers for George's on December 8, 2008*. Thus, the Plaintiffs' claim that the timing of the production of George's audited balance sheet caused problems for Payne in producing a timely report based on information he is allowed to have (i.e. current net worth information) is simply not true. In fact, Payne and the Plaintiffs still issued the April 14, 2009 supplemental report which is the subject of this Motion to Strike without even using an audited balance sheet – that is to say, they did not hold off on supplementing his initial report in anticipation of receiving the audited balance sheet which they now claim was such a critical missing component of Payne's analysis.

Payne's April 14, 2009 supplemental report only added George's income/expense information to what he had previously considered. Payne had this income/expense information in his possession 3 months before issuing the supplement. Thus, the Plaintiffs' arguments regarding the timing of the production of the audited balance sheet are a red herring.

Payne's April 14, 2009, supplemental report was also provided to George's over 3 months after his January 5, 2009 deadline, without seeking leave of the court and merely adding information that Payne had in his possession since early January without correcting anything. Payne added only information which this Court had already determined that he and the Plaintiffs had no right to possess in the first place – namely, George's Income Statements. [Dkt. #1920]. On April 9, 2009, counsel for George's

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<sup>1</sup> Due to the highly confidential nature of the information contained in George's Net Worth and Balance Sheets, a copy of this exhibit was provided to the Court under a separate cover for an *in camera* review on February 22, 2009, pursuant to Paragraph 6 of the Confidentiality Order (Dkt. #985).

demanded the prompt return of all of the non-discoverable Income Statements and all Balance Sheets for the years 2004 – 2007 (the latter of which were noncurrent, unaudited Balance Sheets and therefore also non-discoverable pursuant to this Court’s Protective Order). [Id.; see also Exh. A to the instant Reply].

The Plaintiffs also argue that the instant Motion is moot, as they intend to supplement again (presumably again without leave of Court and regardless of deadlines in the case). However, the Plaintiffs have taken no steps to formally withdraw either Payne’s initial report dated January 5, 2009, or his supplemental report dated April 14, 2009, so the instant motion is not moot, as the Plaintiffs claim.

Plaintiffs intend to supplement Payne’s report again based on George’s, Inc.’s single audited 2008 Balance Sheet showing the same net worth as that shown in the unaudited 2008 Balance Sheet produced by George’s in December, 2008. More than 5 months have passed since Payne first possessed George’s current net worth numbers, over 4 months have passed since Payne’s report deadline, a month has passed since the discovery deadline, and over 2 weeks have passed since the deposition of Mr. Payne—yet, Plaintiffs still have not sought leave of this Court to supplement any portion of Payne’s report, nor do they have a reasonable basis to do so. George’s is being prejudiced in not being able to pin down what Payne’s opinions would be if he was allowed to testify at trial, because he keeps changing them and intends to continue to do so. George’s fails to see the propriety in Plaintiffs producing continuing, rolling supplemental (not corrective) reports without regard for the Court’s deadlines established in the scheduling orders for this case. The Plaintiffs at one time asserted to the Court that if they ever determined that a supplemental report by Payne was desired, they would file

a motion for leave to supplement. [Dkt. #1867 at 8]. However, the Plaintiffs' words and deeds have not coincided on this point.

For the reasons discussed above, separate Defendants, George's, Inc. and George's Farms, Inc., urge the Court to strike the Supplemental Report of Plaintiffs' expert, David R. Payne, as improper and untimely, and further pray for any and all other relief to which they may be entitled.

Respectfully submitted,

/s/ James M. Graves

James M. Graves (OB #16657)  
Woody Bassett (*appearing pro hac vice*)  
K.C. Dupps Tucker (*appearing pro hac vice*)  
BASSETT LAW FIRM LLP  
221 North College Avenue  
P.O. Box 3618  
Fayetteville, AR 72702-3618  
(479) 521-9996  
(479) 521-9600 Facsimile

-and-

Randall E. Rose (OB #7753)  
The Owens Law Firm, P.C.  
234 West 13<sup>th</sup> Street  
Tulsa, OK 74119  
(918) 587-0021  
(918) 587-6111 Facsimile  
**ATTORNEYS FOR GEORGE'S, INC. and  
GEORGE'S FARMS, INC.**

### **CERTIFICATE OF SERVICE**

I certify that on the 13<sup>th</sup> day of May, 2009, I electronically transmitted the attached document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Robert D. Singletary, Assistant Attorney General	robert_singletary@oag.state.ok

Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	

J. Randall Miller	rmiller@mkblaw.net
David P. Page	dpage@mkblaw.net
Louis W. Bullock	lbullock@mkblaw.net
Miller Keffer & Bullock	

Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Motley Rice	

#### **COUNSEL FOR PLAINTIFF**

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	

Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Sidley Austin LLP	

Robert W. George	robert.george@tyson.com
Michael Bond	michael.bond@kutakrock.com
Kutak Rock LLP	

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.**

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin  
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

**COUNSEL FOR WILLOW BROOK FOODS, INC.**

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger  
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net  
lzingue@pmrlaw.net  
dsenger@pmrlaw.net

Robert E. Sanders  
E. Stephen Williams  
Young Williams P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

A. Scott McDaniel  
Nicole Longwell

smcdaniel@mhla-law.com  
nlongwell@mhla-law.com

**COUNSEL FOR PETERSON FARMS, INC.**

John R. Elrod  
Vicki Bronson  
Conner & Winters, P.C.

jelrod@cwlaw.com  
vbronson@cwlaw.com

Bruce W. Freeman  
D. Richard Funk  
Conner & Winters, LLLP

bfreeman@cwlaw.com

**COUNSEL FOR SIMMONS FOODS, INC.**

John H. Tucker  
Colin H. Tucker  
Theresa Noble Hill  
Rhodes, Hieronymus, Jones, Tucker & Gable

jtuckercourts@rhodesokla.com  
chtucker@rhodesokla.com  
thillcourts@rhodesokla.com

Terry W. West  
The West Law Firm

terry@thewestlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Krisann Kleibacker Lee  
Dara D. Mann  
Faegre & Benson LLP

dehrich@faegre.com  
bjones@faegre.com  
kklee@faegre.com  
dmann@faegre.com

**COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC**

Michael D. Graves  
D. Kenyon Williams, Jr.  
**COUNSEL FOR POULTRY GROWERS**

mgraves@hallestill.com  
kwilliams@hallestill.com

William B. Federman  
Jennifer F. Sherrill  
Federman & Sherwood

wfederman@aol.com  
jfs@federmanlaw.com

Teresa Marks  
Charles Moulton  
Office of the Attorney General

teresa.marks@arkansasag.gov  
charles.moulton@arkansasag.gov

**COUNSEL FOR THE PLAINTIFF OF ARKANSAS AND THE ARKANSAS  
NATURAL RESOURCES COMMISSION**

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong  
Secretary of the Environment  
Plaintiff of Oklahoma  
3800 North Classen  
Oklahoma City, OK 73118  
**COUNSEL FOR PLAINTIFF**

Thomas C. Green  
Sidley Austin Brown & Wood LLP  
1501 K Street NW  
Washington, DC 20005  
**COUNSEL FOR TYSON FOODS, INC.,  
TYSON POULTRY, INC., TYSON  
CHICKEN, INC.; AND COBB-  
VANTRESS, INC.**

/s/James Graves  
James M. Graves